

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

CG Docket No. 02-278

REQUEST FOR STAY

The Produce Marketing Association (“PMA”) hereby requests the Federal Communications Commission (“FCC” or “Commission”) to stay the new rules governing unsolicited facsimile advertisements that the Commission adopted in the above-captioned proceeding pending a decision on PMA’s Request for Clarification that was filed simultaneously with this Request for Stay.¹ PMA did not have an opportunity to comment earlier in this proceeding because the proposed rule did not adequately provide notice to the business community that the FCC was contemplating both eliminating the established business relationship exemption for faxing altogether, and imposing onerous new consent requirements that effectively apply to a broad range of routine and desired business communications. A stay is necessary so that the Commission may review PMA’s request, as well as the petitions and requests filed by several other parties, develop a full record, and reconsider the business, financial and constitutional implications of the new rules for for-profit and non-profit organizations. If, after a fully developed record, the FCC elects not to alter these requirements, it

¹ The fax rules are contained in 47 C.F.R. §§ 64.1200(a)(3) and 68.318. This request is made pursuant to Section 1.43 of the Commission’s Rules, 47 C.F.R. § 1.43.

is apparent that affected businesses will need much more time to adapt their business practices to the new onerous requirements.

PMA HAS SATISFIED THE REQUIREMENTS FOR GRANTING A STAY

The Commission has explained that when a party requests a stay, it must show that it is likely to succeed on the merits of its claim, that it will suffer irreparable harm if a stay is not granted, that no other party will suffer harm if the stay is granted, and that the stay will otherwise serve the public interest.² For the reasons stated below, all these criteria are met.

PMA is likely to succeed on the merits of its Request for Clarification. PMA has requested that the Commission reinstate the “established business relationship” exception for unsolicited faxes, clarify the types of faxes that are “unsolicited advertisements,” and explicitly recognize that any commercially reasonable means of consent meets the “prior express invitation or permission” requirement of the Telephone Consumer Protection Act (TCPA). The new rules are overly broad and will impede many routine business communications, and the FCC failed to consider less restrictive means of obtaining consent.

PMA will suffer irreparable harm if the Commission does not grant a stay. PMA is a non-profit global trade association serving more than 2,400 marketers in the production, distribution, retail, and foodservice sectors of the produce industry. PMA’s membership represents ninety percent of all produce sold to consumers in the United States. Members and others interested in the produce industry depend on PMA to provide up to date information on the produce industry, on events and activities of interest to industry members that we and others sponsor, and government regulations affecting the industry. The new fax requirements will restrict PMA’s ability to communicate with its members, as well as non-members with a stake in

² See *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass’n. v. FPC*, 259 F.2d 921 (D.C. Cir. 1958).

the produce industry, necessitating thousands of signed consent forms from members, prospective members, past trade show and conference attendees, our own vendors and suppliers, and even our own employees. The cost of processing, retaining and managing the volume of consents will strain our resources. A recent poll conducted at a PMA web conference on the do not fax rules revealed that many of the participants conduct a significant amount of business with customers and vendors through fax communications, with approximately 40 percent indicating that they rely on faxes for 60 percent or more of their business communications. The burden of managing the consent process is thus magnified throughout our industry. Efforts to inform our members and to bring PMA into compliance with these new regulations already have cost PMA more than \$14,000.

No other party will suffer harm if the Commission does not grant a stay; a stay would maintain the *status quo* until the Commission reviews the full record in this proceeding.

A stay would otherwise serve the public interest. The proposed rule did not adequately provide notice to the business community that the FCC was contemplating both eliminating the established business relationship exemption for faxing altogether, and imposing onerous new consent requirements that effectively apply to a broad range of routine and desired business communications.³ The Commission's final rule therefore is not predicated on a fully developed record. Moreover, the for-profit and non-profit business community is still perplexed by several

³ The Notice of Proposed Rulemaking sought comment on whether the established business relationship exemption has had an adverse impact on consumer privacy, whether the Commission should amend its rules to expressly provide for such an exemption, and whether it should clarify the scope of the "exemption." The Commission did not suggest that it would eliminate the exemption altogether, however. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 17 FCC Rcd 17459, ¶ 39 (2002). Concerning the consent requirement, the Commission sought comment on whether publication of a fax number in an organization's directory constitutes invitation or permission to receive an unsolicited fax, not whether a signed, written consent should be required. *See id.* ¶ 38. In that regard, notice and an opportunity to opt-out would be a far less restrictive approach to obtaining consent.

provisions of the new rule, in part because the Office of Management and Budget has not yet approved certain information collection requirements under the Paperwork Reduction Act.

The FCC failed to thoroughly consider the administrative burdens that the new rules impose on businesses that must now scramble to obtain consents, even for customers and members who have already indicated their preference to receive information via fax. The new requirements are burdensome for non-profit and for-profit organizations alike, and the FCC has failed to consider the costs in time and manpower associated with obtaining and processing consents for thousands of members. Indeed, one wonders if the FCC should have commissioned an environmental impact assessment to evaluate the potential environmental impact of the millions of paper consent forms that will be required as a result of this final rule. In the produce industry alone, our several thousand members often communicate with the same customers and suppliers, necessitating a web of cross-consent forms and a recordkeeping nightmare for all

In the *Report and Order* adopting the new rules, the FCC noted the many comments it received from small businesses about the cost to them, in time, copy paper and toner, and in tying up fax machines, of unsolicited faxes,⁴ but gave little consideration to the concerns of large businesses and non-profit organizations that rely on fax communications on a daily basis. The new requirements fail to even afford a “safe harbor” for unsolicited faxes sent in error or transmitted to an unintended recipient.

Clearly the FCC must grant PMA’s Request for Stay because PMA is likely to prevail on the merits of its Request for Clarification, PMA will be irreparably harmed absent a stay, no other parties will be harmed if the Commission grants a stay, and a stay is otherwise in the public interest.

⁴ See *Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991*, Report and Order, 68 Fed. Reg. 44144, ¶ 186 (2003).


CONCLUSION

For the foregoing reasons, PMA requests the Commission to stay the effective date of the new fax rules until the Commission has an opportunity to reconsider and clarify, based on a fully developed record, these ill-advised and burdensome new requirements on the for-profit and non-profit business community.

Respectfully submitted,

Produce Marketing Association

By:



Sheila A. Millar
Tracy P. Marshall
Keller and Heckman, LLP
1001 G Street, Suite 500 West
Washington, D.C. 20001
(202) 434-4100 (phone)
(202) 434-4646 (facsimile)

Attorneys for
Produce Marketing Association

Dated: August 18, 2003